IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KIAGE & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 98 OF 2017

BETWEEN

SELESTINE MUREITHI MUGO.....APPELLANT

AND

REPUBLIC.......................................RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Ngenye Macharia, J.) dated 19th *March, 2015* **in HC. CR. A. No. 222 of 2012)**

****

JUDGMENT OF THE COURT

On 19th August 2011 RMW, a young girl just over 11 years old was on a visit to her brother **BM** (PW2) at Kiambu from her home in Ruiru. At about 4pm, she left M's house for a nearby house belonging to her aunt to watch television with other children. While there the appellant herein **Selestine Mureithi**, a person well-known to her as a worker in that homestead came and, taking her by the hand, led her to his house.

There, he roughly placed her on a bed, stripped her of her bikers and panties, removed his own trousers and boxers and, above her screams, proceeded to insert his penis into her vagina, the penetration rupturing her hymen - as the medical examination and the report produced in court by Dr. Mohamed Faizal of Kiambu District Hospital would later reveal. RMW's screams caught the attention of her brother **PW2** who had come after her and his other siblings at about 8pm. The screams, a child's were coming from the worker's house and **PW2** rushed in that direction accompanied by a woman neighbour of his uncle's. They knocked at the door which was bolted from the inside. Eliciting no response, PW2 broke it down to reveal the appellant, literally pants down, in the act of sexual intercourse with the minor. The neighbour instantly raised alarm and villagers who responded came to the scene and gave the appellant a thorough beating before effecting a citizen arrest and taking him to the Kiambu, Police Station. **PW2** took the child to the Kiambu District Hospital for examination and treatment.

The appellant was duly charged before the Magistrate's Court at Kiambu with the offence of Defilement contrary to **section 8(1)(2)** (sic) of the **Sexual Offences Act**, No. 3 of 2006 for intentionally and unlawfully causing his penis to penetrate the vagina of RMW *'aged 11 years'*. He also faced an alternative charge of indecent act with a child for touching RMW's vagina at the time and place of the main charge. After hearing testimony from four prosecution witnesses and the appellant's unsworn statement, the Senior Principle Magistrate found the offence proved and convicted him. She then sentenced him to life imprisonment stating, as she did so, that *"there [was] only one mandatory sentence prescribed for the offence,"* and *"there is no room for this court to manoeuvre."*

Aggrieved, the appellant appealed to the High Court at Kiambu against both conviction and sentence where he fared no better, as Ngenye-Macharia, J. by a judgment dated and delivered on 19th March 2015, dismissed that appeal in its entirely, provoking this second and last appeal.

In his self-crafted grounds of appeal the appellant complained that the learned Judge erred in law by overlooking the bad blood between the appellant and **PW2**; rubbishing his request for a State-funded counsel; permitting Dr. Faizal to produce the medical documents made by a Dr. Kimani whose reluctance to testify was mischievous; failing to interrogate the P3 form so as to establish the age of the hymen rupture; failing to find that the complainant was coached; holding to be true the complainant's contradictory testimony; upholding a conviction yet crucial witnesses were not called and rejecting the appellant's defence without giving reasons.

The appellant thereafter filed an amended supplementary memorandum of appeal which captures more succinctly the grounds on which he relied in this appeal and he amplified in the submissions that he subsequently filed. The grounds of grievance are;

1. That the burden of prove (sic) was not discharged and more so in view of the fact that the victim's age was not proved to the required standard needed in law and medical evidence was unsatisfactory.

2. That my conviction was manifestly unsafe bad in law and a nullity as the trial proceeded on a defective charge.

3. That the appellant was prejudiced, confused and embarrassed and unable to prepare a proper defence due to the defective nature of the charge.

4. That my fundamental rights to a fair and impartial trial was violated as indeed I was not served with witness statements pursuant to Article 50(2) (j) of the Constitution.

We have considered the appellant's filed written submissions which he relied on entirely at the hearing of the appeal. In them, he contended that he could *"prove with the accuracy of mathematics"* that the victim's age was more than 11 years. Indeed, he went on to demonstrate that as RMW was born on 8th June, 2000 and the offence was alleged to have been committed on 19th August 2011, her age was *11 years and two months* and therefore outside the purview of **section 8(2)** of the **Sexual Offences Act** under which he was charged. Citing ***HILLARY NYONGESA vs. REPUBLIC*** **[2010] eKLR** Eldoret Criminal Appeal No. 123 of 2009 and the Uganda case of ***FRANCIS OMURONI vs. UGANDA***, Court of Appeal Case No. 2 of 2000, he contended that the age of a victim of a sexual offence is paramount as it implicates the sentence to be imposed.

The appellant also argued that the medical evidence relied on by the two courts below was unsatisfactory and confusing because whereas there was indication that the victim's hymen was ruptured, there was no telling when that occurred especially because the P3 form did not indicate the degree of injury suffered by her. To him the ruptured hymen was not demonstrative of penetration and he asserted that the case against him was not fabricated. Relying on ***WOOLMINGTON vs. DIRECTOR OF PUBLIC PROSECUTIONS*** ***[1935] 462,*** he urged us to find that the case was not proved beyond reasonable doubt and he was thus entitled to an acquittal. He finally submitted that his right to be informed of the evidence the prosecution intended to rely on as enshrined in **Article 50(2) (j)** of the Constitution was violated as the trial court had directed that witness statements be availed to him, a layman who was in custody, *at his own cost*.

We think it apposite to first address the last of the issues raised by the appellant in his submissions. As a matter of principle, we accept the appellant's argument that an accused person is entitled, as of right, to a copy of the charge sheet, and the witness statements. This is fundamental to the right to a fair trial. The prosecution is the one that brings an accused person to court and it seems to us strange that he can only obtain copies of the evidence they intend to bring against him at his cost. The Constitution provides that an accused person is *entitled "to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence."* It would be to make that provision entirely of no effect were accused persons to be expected to have access to the statements only at their cost. That cost must be borne by the prosecution and reasonable access to it by the accused must mean, at the very least, making a copy of the same available to him.

Having stated so, however, we do not see anything on the record to indicate that the appellant did not have access to the prosecution witness' statements. After the trial magistrate made the order on 12th September 2011 that the charge sheet and the witness statements be supplied to the appellant, albeit *'at his own cost,'* which was erroneous, the case was fixed for hearing on 31st October 2011. There were two mentions in between at which the appellant raised no complaint about not having received the charge sheet and prosecution witnesses' statements. Indeed, on that first hearing, he stated on the record that he was ready to proceed. We take it, therefore, that he did have access to the prosecution evidence and so nothing turns on that complaint.

Nor is the current appeal the occasion for us to make a pronouncement on the alleged violation of the appellant's right to legal representation at state expense. It is safe to state that the Constitution does not provide for such legal representation in absolute terms: **Article 50(2) (h)** provides that an accused person has a right to be assigned an advocate by the State and at State expense *"if substantial injustice would otherwise result,"* which right he should be informed of promptly. We are aware that the Supreme Court has rendered itself authoritatively on the applicable principles and the factors a court should consider in determining whether an accused person is entitled to State-funded legal representation. See ***REPUBLIC vs. KARISA CHENGO*** ***[2017] eKLR.***

In this case, however, we decline to make a definitive pronouncement on whether the right was bridged without the benefit of a fully argued case before us on appeal from a judgment of the High Court which has been fully rendered on the matter and has directly decided it. We would be jumping the gun to deal with this matter which has been raised rather peripherally and belatedly before us. We think there is merit in the short answer provided by **Mr Obiri** that the record of this appeal is not indicative of substantial injustice having occurred as the appellant was able to cross examine the witnesses and was not prejudiced.

On the main question of whether the offence of defilement was proved, we are faced with concurrent findings of fact by the two courts below which we would pay homage to and not lightly disturb. See ***M'RIUNGU vs. REPUBLIC*** ***[1983] KLR 455***. Those findings are to the effect that the appellant was found literally with pants down by **PW2** in *flagrante delicto*, abusing the minor. There is no doubt as to his identity and the medical evidence produced did confirm the minor's evidence, which the trial magistrate believed, that there had been penetrative sexual intercourse performed on the minor. Her evidence was that the appellant tore into her vagina above her screams with his penis, and that was a classic case of defilement. It is worth recalling that penetration, no matter how shallow, completes the offence of defilement. It is of no moment that the medical evidence did not reveal presence of spermatozoa in the minor's vagina. For the offence of defilement insertion, be it partial or complete, is enough, and ejaculation is quite irrelevant, save to provide further proof of the act. That much is clear from **section 8(1)** of the **Sexual Offences Act** which predicates the offence of defilement on *"an act which causes penetration*" with a child. See also ***LUCAS MUSA HURA vs. REPUBLIC*** ***[2019] eKLR*** and ***MARK IRURI MOSE vs. REPUBLIC*** ***[2013] eKLR.***

Turning now to the sentence, we note that both the trial court and the High Court proceeded on the basis that the complainant's age called for life imprisonment as the sentence to be imposed upon conviction. **Section 8(2)** of the **Sexual Offences Act** provides that;

> **“Any person who commits an offence of defilement with a child aged eleven years or less, shall upon conviction be sentenced to imprisonment for life.”   (Our emphasis)**

As it is not disputed that RMW was aged eleven months and two years, was she aged “*eleven years or less*” as to warrant the life sentence? It seems to us that it would be aberrant were we to read eleven years and two months as amounting to eleven years or less

to warrant imposition of the sentence of life imprisonment. It may well be that the graduated scheme of sentences under **section 8** of the Act seems to leave gaps and ambiguities and our duty must be to resolve such ambiguities in favour of the appellant. This is not only logical and reasonable but also consistent with the need to grant persons accused of crime with the benefit of the doubt as well as, of ambiguity which in this case would commend the lesser of possible sentences.

Moreover, the sentence of life imprisonment was imposed by the trial court and upheld on first appeal on the basis that there was no discretion in the matter meaning really that the courts did not have occasion to consider the full individualized circumstances of the case in imposing sentence. It is now trite since the Supreme Court’s decision in ***FRANCIS MURUATETU & ANOR vs. REPUBLIC [2017] eKLR*** that sentencing is a judicial function and a court must apply its mind to the matter, not merely impose a sentence mandatorily prescribed.

Bearing in mind all the matters we have addressed, we are minded to interfere with the sentence of life imprisonment which we hereby set aside and substitute it with a sentence of **eighteen (18)** years in prison to run from the date the appellant was first sentenced. The appeal on conviction, however fails and is dismissed.

Orders accordingly.

Dated and delivered at Nairobi this 24th day of July, 2020.

W. OUKO, P

………………………….

JUDGE OF APPEAL

P. O. KIAGE

………………………….

JUDGE OF APPEAL

A. K. MURGOR

……………………….....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR